In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1627

Louis J. Lefkowitz, Attorney General of the State of New York,

Petitioner,

against

Leon Newsome,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the Court of Appeals is reported at 492 F. 2d 1166; the memorandum and order of the District Court for the Eastern District of New York is not yet reported. They appear in the Appendix at pages 19a and 17a, respectively.

Jurisdiction

The petition for a writ of certiorari was filed on April 29, 1974. Certiorari was granted on June 17, 1974, limited to Question "1" set forth in the petition.

The judgment of the Court of Appeals was entered on January 28, 1974. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

Question Presented

Whether a state defendant who pleads guilty may seek federal habeas corpus review of his conviction merely because the state has permitted him appellate review of a pre-trial motion to suppress, on constitutional grounds, the evidence that would have been offered against him had there been a trial?

Statutory Provisions Involved

28 U.S.C. § 2241(c) provides in pertinent part:

> "The writ of habeas corpus shall not extend to a person unless—
>
> * * * * * *
>
> "(3) He is in custody in violation of the Constitution or law or treaties of the United States; * * *"

N.Y. Code of Criminal Procedure* § 813-c provides:

> "A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to

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* Effective September 1, 1971 the Code of Criminal Procedure was superseded by the Criminal Procedure Law, L. 1970, c. 996, 997, McKinney's Consolidated Laws of New York, Book 11A. The material contained in § 813-c has been recodified at N.Y.C.P.L. §§ 710.20(1) and 710.70(1)(2).

believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

"If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

"If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Added L. 1962, c. 954, § 1, eff. April 29, 1962."

McKinney's Consolidated Laws of New York, Book 66, Part 3 page 78 (Supp. 1970).

Statement of the Case

Respondent was arrested for loitering, N.Y. Penal Law § 240.35(6), in the lobby of a New York City Housing Authority building at 10:20 P.M. on February 12, 1970, after Housing Authority police were informed by an anonymous tenant that there was a suspicious person in the hallway (8a, 21a).

A search of respondent's person made at the time of the arrest revealed heroin and a set of "works," so that he was also charged in the Criminal Court of the City of New York, County of Queens, with possession of a dangerous drug, fourth degree, *id.*, § 220.05, and criminally possessing a hyperdermic instrument, *id.*, § 220.45, both Class A misdemeanors carrying a maximum of one year's imprisonment (*ibid.*).

The arresting officer testified at a pre-trial hearing on a motion to suppress the evidence pursuant to N.Y. Code of Crim. Pro. § 813-c that he had briefly observed respondent in the lobby. When approached by the officer and asked what he was doing, respondent had replied, "I am not doing anything", claiming to have just arrived. He was unable to produce any identification. His arrest and search followed, *ibid.*

Respondent was found guilty of loitering and the motion to suppress was denied. The Court rejected the claim that the arrest for loitering was made without probable cause and that the loitering statute was unconstitutional, *ibid.*

On May 7, 1970, respondent pleaded guilty to attempted possession of drugs and hypodermic charges. He was sentenced to 90 days imprisonment. He received an unconditional discharge on the loitering conviction (6a-7a, 21a-22a).

Respondent never served the jail sentence. A certificate of reasonable doubt was issued pursuant to former N.Y. Code of Crim. Pro. § 527 and petitioner was released on $100 cash bail pending appeal. He has remained at large ever since (7a, 22a).

An appeal was taken to the Appellate Term of the Supreme Court, Second and Eleventh Judicial Districts. On June 21, 1971 the judgment of the Criminal Court was modified by reversing the loitering conviction on the grounds of insufficient evidence and a defective information. However, the search incident to the loitering arrest which yielded the contraband was upheld on the basis that probable cause had existed to arrest respondent on that charge (8a-11a, 22a).

On July 14, 1971, leave to appeal to the New York Court of Appeals was denied by Hon. Charles D. Breitel, Associate (now Chief) Judge (11a-12a). Certiorari was denied *sub nom. Newsome* v. *New York*, 405 U.S. 908 (1972). The instant proceeding was then commenced in the District Court (1a).

The respondents named in the habeas proceeding never appeared. In view of his duty to defend the constitutionality of state statutes, N.Y. Executive Law § 71, the Attorney General of the State of New York requested and was granted leave to intervene as a respondent, see motion to intervene dated May 19, 1972.*

On May 23, 1972, the District Court dismissed the petition for a writ of habeas corpus for lack of jurisdiction on the ground that petitioner was not in custody within the meaning of 28 U.S.C. § 2241. A certificate of probable cause, leave to proceed in *forma pauperis* and assigned counsel were granted by the Court of Appeals. The case was held pending the decision of this Court in *Hensly* v. *Municipal Court,* 411 U.S. 345 (1973), and remanded in the light of that ruling (3a; 22a, fn. 5).

On July 12, 1973, the District Court granted petitioner's application for a writ of habeas corpus. The decision was based upon the fact that the contraband was seized incidental to an arrest on a charge of loitering, N.Y. Penal Law § 240.35(6), which was held unconstitutional in *People* v. *Berck,* 32 N Y 2d 567, *cert. den. sub nom. New York* v. *Berck,* 32 N Y 2d 567, 300 N.E. 2d 411, 347 N.Y.S. 2d 33 *cert. den. sub nom. New York* v. *Berck,* 414 U.S. 1093 (1973), (18a, 23a).

On appeal, the judgment of the District Court was affirmed. In its decision, the Court of Appeals for the Second Circuit adhered to its earlier rulings that federal habeas corpus was available to one in respondent's position although his conviction was based on a plea of guilty (23a-27a). It also held N.Y. Penal Law § 240.35 (6) uncon-

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* The opinion of the Court of Appeals erroneously states at page 23a that the petitioner appeared in this proceeding for the first time before that Court. In fact, he had intervened and appeared in the Appellate Term, in this Court in opposition to certiorari in *Newsome* v. *New York, supra,* as well as in the District Court in this case (2a).

stitutional, basing its decision largely upon that of the New York Court of Appeals in the *Berck* case (27a-33a).

On June 17, 1974 this Court granted certiorari as to the first question raised in the petition, relating to respondent's standing to seek review of his conviction by federal habeas corpus.

Summary of Argument

This Court in six recent decisions has formulated the rule that a state defendant who pleads guilty to a criminal charge may not subsequently ask a federal court to review his conviction via habeas corpus, except on the ground that the plea was invalid or the state lacked the power to bring him to trial, *Blackledge* v. *Perry,* 415 U.S. ——, 40 L. ed. 2d 628 (1974); *Tollett* v. *Henderson,* 411 U.S. 258 (1973); *North Carolina* v. *Alford,* 400 U.S. 25 (1970); *Brady* v. *United States,* 397 U.S. 742 (1970); *McMann* v. *Richardson,* 397 U.S. 759 (1970); and *Parker* v. *North Carolina,* 397 U.S. 790 (1970). The instant case falls squarely within both the letter and the spirit of these decisions. Although the State of New York has provided for appellate review of the denial of pre-trial suppression motions, despite the defendant's subsequent plea of guilty, the prior resort to such a remedy may not be used as a general basis for federal collateral attack on such a conviction. The Legislative history of N. Y. Code of Crim. Pro. § 813-c, the nature of federal court jurisdiction as a limited grant of authority by the Congress, the fair, efficient administration of the habeas corpus remedy and, most importantly, the nature of a conviction based upon a plea of guilty fully support this Court's adherence to its prior decisions and a reversal of the judgment below.

ARGUMENT

A State judgment of conviction predicated upon a voluntary plea of guilty is not subject to federal habeas corpus review except as to the power of the State to bring the defendant to trial.

I

Respondent's plea of guilty was a voluntary act in the fullest sense of the word, and entered upon the advice of competent counsel, *cf. Boykin* v. *Alabama*, 395 U.S. 238 (1969). This Court has held that such a plea of guilty is

> "more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a judge or jury," *Brady* v. *United States, supra*, 397 U.S. at 748.

The weight and significance attached to a plea of guilty is such that this Court has barred collateral attack upon the conviction of a defendant who knowingly persevered in a plea of guilty despite his unwillingness to admit his guilt, *North Carolina* v. *Alford, supra*, 400 U.S. at 27.

More recently in *Tollett* v. *Henderson, supra*, this Court summarized the rule as follows:

> "We thus reaffirm the principle recognized in the *Brady* trilogy; a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea

by showing that the advice he received from counsel was not within the standards set forth in *McMann.*" (411 U.S. at 267).

This Court has refused to permit inquiry into a variety of alleged underlying constitutional defects: a statute which permitted the exercise of Fifth and Sixth Amendment rights only at the peril of exposure to a possible death penalty, *Brady* v. *United States, supra; Parker* v. *North Carolina, supra;* a coerced confession which, at the time, could not be tested except by going to trial, *McMann* v. *Richardson, supra;* exclusion of blacks from both grand and petit juries, *Tollett* v. *Henderson, supra,* and *Parker* v. *North Carolina, supra,* respectively. It is noteworthy that all of the defendants were charged with capital crimes* where the psychological pressure to avoid the risk of the death penalty was a significant factor. Only where the claim would, if sustained, have acted as a bar to the prosecution was a defendant convicted upon his plea of guilty permitted to litigate the matter on federal habeas corpus, *Blackledge* v. *Perry,* 415 U.S. ——; 40 L. Ed. 2d 628 (1974). However, in doing so, this Court reiterated the doctrine that, except for claims related to the validity of the plea itself, federal habeas corpus was otherwise precluded, *Id.,* 415 U.S. at ——; 40 L. Ed. 2d at 635-636.

Viewing the decision below in the light of these authorities, the fundamental error of the Second Circuit is immediately apparent: by failing to address itself to the issue of whether the right to pursue a constitutional claim as to the admissibility of evidence by federal habeas corpus could ever, as a matter of *federal* law, survive a plea of guilty, the court mistakenly treated a question of federal

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* In *McMann* v. *Richardson,* defendant was accused of murder; in *Williams* and *Dash,* the other cases decided with it, the defendants were charged respectively with rape and robbery, 397 U.S. at 761-764.

subject matter jurisdiction as if it were one of the intent of the defendant to litigate or abandon a claim at his whim. This improper inquiry into whether the evidentiary claim had been "waived" by a plea of guilty was first stated in *United States ex rel. Rogers* v. *Warden,* 381 F.2d 209, 212-215 (2d Cir. 1967) and repeated in *United States ex rel. Molloy* v. *Follette,* 391 F.2d 231, 232 (2d Cir. 1968) and *United States ex rel. Stephen J.B.* v. *Shelly,* 430 F.2d 215, 217.* In the opinion below, this approach had become a casual assumption (24a-25a). Yet this rule established by the Court of Appeals was a radical deviation from the line of prior authority developed by the district courts of the Second Circuit and, indeed, by the Court of Appeals itself. This was perhaps, best articulated by Judge BRYAN, writing in *United States ex rel. Mendez* v. *Fish,* 259 F.Supp. 146, 147-148 (S.D.N.Y. 1965), where, in an analysis similar to this Court's own recent decisions, he declared:

> Petitioner's imprisonment is not based upon an unconstitutional search and seizure or denial of due process. Any evidence obtained unconstitutionally was never used against her. Petitioner's imprisonment is based solely on her plea of guilty. * * * Consequently, although New York may provide petitioner with a statutory right to review a denial of a motion to suppress by appeal from a judgment of conviction based on a voluntary plea of guilty, there is no such constitutional right.

See also: *United States ex rel. Rosen* v. *Follette,* 66 Civ. 2756 (S.D.N.Y. 1966) aff'd on other grds 409 F 2d 1042 (2d Cir. 1969) cert. den. 398 U.S. 930 (1970); *United States ex rel. Cunningham* v. *Follette,* 66 Civ. 2428 (S.D.N.Y. 1966) aff'd on other grds 397 F 2d 143 (2d Cir. 1968) cert. den. 393 U.S. 1058 (1969). Cf. *United States ex rel. Jack-*

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* The opinion of the Court of Appeals erroneously states (25a) that petitioner was a party in the *Stephen J.B.* case.

son v. *Warden*, 255 F.Supp. 33, 38 (S.D.N.Y. 1966) app. dism. April 3, 1967 (2d Cir. Dtct #30679), the only district court case which allowed consideration of the underlying claim, and only by characterizing the plea of guilty as being conditional in nature. The statement contained in *Rogers*, 381 F.2d at 213, that a voluntary plea of guilty is not, *ipso facto*, a waiver of a defendant's constitutional claims not only ignores that court's prior decisions in cases such as *United States ex rel. Marinaccio* v. *Fay*, 336 F.2d 272 (2d Cir. 1964) and *United States ex rel. Vaughn* v. *LaVallee*, 318 F2d 499, 500 (2d Cir. 1963) but is inconsistent with authorities cited on that very page, *United States ex rel. Glenn* v. *McMann*, 349 F2d 1018, 1019 (2d Cir. 1965) cert. den. 383 U.S. 915 (1966) and *United States ex rel. Boucher* v. *Reincke*, 341 F2d 977, 980-981 (2d Cir. 1965).

The Court below clearly erred and should have followed the lead of the Ninth Circuit in *Mann* v. *Smith*, 488 F. 2d 245 (9th Cir. 1973), *cert. den.* 415 U.S. 39 L. ed. 2d 490 (1974). Whatever question may have been left open in *McMann* v. *Richardson, supra*, 397 U.S. at 766, fn. 13, as to the availability of federal habeas corpus where a state appellate remedy exists to review the denial of a pre-trial suppression motion, has been resolved by the cases of *Tollett* v. *Henderson, supra*, and *Blackledge* v. *Perry, supra*. Nevertheless, we do not rely solely upon *stare decisis*. Even in the absence of these authorities, it is clear that the Court of Appeals erred, by exceeding its jurisdiction, by misinterpreting the legislative history of the statute at bar and by trespassing upon the proper prerogatives of the New York State Legislature to determine what policy is best for the State.

II

Perhaps the most pernicious effect of the opinion below is that it has enlarged federal habeas corpus jurisdiction on the basis of a state law which was without power to create such an additional federal remedy and, in the

process, has usurped the power of the Congress to prescribe the jurisdiction of the federal courts. It also gives legal sanction to the dubious proposition that federal law, in this case 28 U.S.C. § 2241(c) (3), need not be enforced uniformly. It has established one rule for the State of New York, while continuing to adhere to the strict waiver rule for those pleading guilty in federal courts, *Santana* v. *United States,* 477 F. 2d 721, 722 (2d Cir. 1973), and in the courts of those states that do not permit appellate review of pre-trial suppression motions once the defendant pleads guilty, *Bergin* v. *McDougall,* 432 F. 2d 935 (2d Cir. 1970).

The federal habeas corpus remedy is a creation of Congress, and is limited to an inquiry into the violation of federal rights, *Cupp* v. *Naughton,* 414 U.S. 141, 146 (1973). The right to appeal and scope of appellate review of a state criminal conviction exists as a matter of state law, *Griffin* v. *Illinois,* 351 U.S. 12, 21 (1956), FRANKFURTER, J., concurring; *McKane* v. *Druston,* 153 U.S. 684, 687-688 (1894). Only Congress has the authority to prescribe the jurisdiction of the lower federal courts, U.S. Const. Art. III § 1; *Palmore* v. *United States,* 411 U.S. 389, 400-401 (1973); *Glidden* v. *Zdanok,* 370 U.S. 530, 551, reh. den. 371 U.S. 854 (1962), and *Lockerty* v. *Phillips,* 319 U.S. 182, 187-88 (1943). In the absence of Congressional action, any attempt by the Legislature to consent by state statute to an enlargement of the jurisdiction of the district courts would be a nullity, *People's Bank* v. *Calhoun,* 102 U.S. (12 Otto) 256, 260-261 (1880); 1 Moore's Fed. Prac. ¶ 0.60[4], p. 608.

The Court of Appeals has thus chosen to disregard this example of the principle of divided sovereignty that is so fundamental to our system. The states always have the option of allowing a defendant more rights than the Constitution requires, *Lego* v. *Twomey,* 404 U.S. 477, 489 (1972). This does not automatically create a corresponding federal right.

Assuming, *arguendo,* that no jurisdictional bar existed to prevent the New York Legislature from effectively consenting to the enlargement of the scope of the federal habeas corpus remedy, clearly, this was never its intent.

New York Code of Criminal Procedure §§ 813-c and 813-g were enacted to bring New York into conformity with this Court's decisions in *Mapp* v. *Ohio,* 367 U.S. 643, reh. den. 368 U.S. 871 (1961) and *Jackson* v. *Denno,* 378 U.S. 368 (1964), and the New York Court of Appeals' ruling in *People* v. *Huntley,* 15 N Y 2d 72, 78, 204 N.E. 2d 179, 255 N.Y.S. 2d 838 (1965), which implemented *Jackson.* See Governor's approval memorandum, McKinney's 1962 N.Y. Sess. Laws, p. 3673, and Memorandum of State Council of Law Enforcement Agencies, 1965 N.Y. Leg. Annual, p. 52. In its recodified form, N.Y. Crim. Pro. Law §§ 710.10-710.70, provisions have also been made to allow pre-trial review of identifications, under the standards established by this Court in *United States* v. *Wade,* 388 U.S. 218 (1967), and *Gilbert* v. *California,* 388 U.S. 263 (1967), *id.* § 710.20(5); see McKinney's N.Y. Crim. Pro. Law, Part 3, Practice Commentary p. 263 (1971).

The legislative history, both at the time of the original enactment and upon recodification, is silent as to whether the New York Legislature ever considered the possibility that the creation of an appellate remedy might give an unsuccessful defendant the eventual right to seek federal habeas corpus. However, it must be inferred that the Legislature never contemplated such result.

Beginning with its decision in *United States ex rel. Rogers* v. *Warden, supra,* 381 F.2d affd. 213 (2d Cir. 1967), the Court of Appeals has erroneously assumed that the exhaustion of the state appellate remedy under § 813-c negated any inference of waiver of the right to federal habeas corpus, citing this Court's decision in *Fay* v. *Noia,* 372 U.S. 391, 438 (1963). However this overlooks this insurmountable jurisdictional obstacle; that the defendant could

not choose to waive or not waive a right the Legislature never had the power to grant to him under the statute, page 11, *supra*.

III

The Court of Appeals has also taken upon itself the legislative authority to determine, without even a scintilla of proof in the record, that court calendars would become more congested; that defendants who lose pre-trial motions will choose to go through a needless trial rather than plead guilty, if they know that by doing so, they will be barred from federal habeas corpus (25a). This is the sheerest speculation.

It is just as likely, if not more likely, that the affirmance of the judgment below would have a deleterious effect on court calendars throughout the country:

While it appears that as of this moment only California, see *Mann* v. *Smith, supra,* and Wisconsin, see Wisc. Stat. Ann. § 971.13(10) [1971], have statutes that allow appellate review of suppression motions after a plea of guilty, such a statute, as the Court of Appeals recognized, can be beneficial to both the defendant and the state (24a). Any movement towards the general adoption of such laws ought not be impeded by placing additional burdens on the states (and incidentally on the federal courts) by opening the doors to additional collateral proceedings over issues which have been fully aired in a state appellate system. Any issue of national importance may still be resolved by this Court, 28 U.S.C. § 1257, as respondent herein attempted to do, *Newsome* v. *New York, supra.*

CONCLUSION

The judgment of the Court of Appeals should be reversed and this cause remanded with instructions that the petition for habeas corpus be dismissed.

Dated: New York, New York, August 9, 1974.

Respectfully submitted,

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